

In a Nunc Pro Tunc Award issued on March 8, 2012, SALJ Lee determined claimant was permanently and totally disabled and awarded claimant benefits for the same.

Respondent appeals and contends that claimant should be compensated for a scheduled injury only.

Claimant maintains she has sustained a whole body impairment and asks the Board to affirm the findings of SALJ Lee. Claimant asserts she is permanently and totally disabled or, in the alternative, is entitled to benefits for a 100% work disability. If the Board determines claimant suffered only a scheduled injury, claimant contends that a plain reading of the Kansas Workers Compensation Act entitles her to a 100% work disability.

The issues before the Board on this appeal are:

1. As a result of claimant's work-related accident, did she sustain a non-scheduled injury and permanent functional impairment to the body as a whole, or did she sustain a scheduled injury and, thus, her permanent functional impairment is limited to her left lower extremity?
2. If claimant sustained a permanent functional impairment to the body as a whole, then what is her functional impairment?
3. If claimant sustained a permanent functional impairment to the body as a whole, is she permanently and totally disabled?
4. If the Board determines that claimant's injury is limited to the left lower extremity, is she entitled to an award for permanent total disability or in the alternative a 100% work disability?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant stepped into a hole while exiting a portable toilet on April 24, 2008, breaking her left ankle and cutting her left lower leg and foot. Claimant underwent two surgeries to repair her left foot and ankle. Because of claimant's injuries, a skin graft was necessary. A patch of skin larger than the size of a softball was harvested from her left thigh and grafted onto her left foot. At the regular hearing, claimant testified the harvested area is very noticeable and is painful. Claimant wears a brace that begins several inches below her left knee and extends to the tip of her foot. Since the accident she has been using a cane. Claimant referred to her cane as a walker, and said she uses it only indoors. Claimant also testified that when she uses a cane, she frequently falls. When claimant goes outside her home, she uses a scooter. Because the tendons in her left lower leg have deteriorated, claimant has developed hammertoes on her left foot. As a result, claimant now has poor balance.

At the time of the accident, claimant was 59 years of age. She graduated from high school and completed some college courses in the clerical field. She has computer skills and knows how to use WordPerfect. Claimant was a weighmaster for respondent from September 2007 through the date of her left ankle injury, but has not worked since. Prior to working for respondent, claimant was a cashier, an admissions officer and generally performed clerical work.

The parties stipulated that the medical records of Dr. Greg Horton from March 4 through October 24, 2010, would be part of the record considered by the SALJ. The final rating report of Dr. Horton, dated October 24, 2010, stated claimant had reached maximum medical improvement. Dr. Horton opined that based on the *Guides*,¹ claimant had a 42% permanent impairment of the left lower extremity. Dr. Horton's report did not give an opinion on whether claimant sustained a whole body impairment. On a form dated July 15, 2010, Dr. Horton checked permanent restrictions and sedentary work only as of July 16, 2010.

At the request of her attorney, on August 31, 2010, claimant was evaluated by Dr. Daniel D. Zimmerman, an internal medicine specialist. He examined claimant, reviewed her medical records and obtained a history from her. His testimony concerning claimant's permanent functional impairment is as follows:

Q. (Mr. Fincher) Can you tell us what that rating was and how you calculated that?

A. (Dr. Zimmerman) The rating was based on the Fourth Edition of the AMA Guides and I have marked the area [sic] that are relevant. Due to the rating from table 36, which is lower limb impairment from gait derangement. [sic] She had severe gait derangement, I gave her a 50 percent body as a whole rating from that table, and then she had residuals of the skin graft area which was rated from table 62 on Page 13/280. And I gave her a class three rating which was possible from 25 to 54 percent. I gave her the lower end of the rating which was 25 percent which is a body as a whole rating. And then combining 50 percent with 25 percent using the combined values chart the overall body as a whole rating was 63 percent.

. . . .

Q. And can you tell the Court exactly why this is not just a single leg rating that you gave her?

A. Well, because the rating for a gait derangement from the musculoskeletal system is a body as a whole rating and the rating for the residuals of the scar and the skin graft area are -- is also a body as a whole rating, particularly the skin is a

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

body system. So you've got two -- two whole body ratings that are offered by the Guides from the Fourth Edition, they combine as whole body ratings.²

Dr. Zimmerman opined that for all practical purposes, claimant was non-ambulatory and required the use of a scooter for mobility. Claimant is able to be on her feet for only short periods of time. According to Dr. Zimmerman, due to spasms that radiate into claimant's lumbar area, she will only be able to remain seated for 20 to 30 minutes. He opined claimant could no longer perform 18 of 18 job tasks she performed in the 15 years before her accident that were identified by vocational rehabilitation counselor Dick Santner. Dr. Zimmerman also opined claimant is not capable of working and would need future medical treatment, including narcotic medication.

On cross-examination, Dr. Zimmerman confirmed claimant's skin graft was limited to the left leg. He also agreed that the site of claimant's impairment was her left leg. Dr. Zimmerman testified that although he rated claimant to the body as a whole for the skin graft and gait derangement, the whole body impairment rating could be converted to a leg impairment rating by dividing it by .4 under section 3.2, page 3/75 of the *Guides*.

ALJ Marcia L. Yates ordered claimant to undergo an independent medical evaluation by orthopedic specialist Dr. Terrence Pratt. On March 21, 2011, Dr. Pratt examined claimant, reviewed her medical records and obtained a history from her. He testified claimant needed to use a short leg brace, but use of a scooter, cane, crutch or a long leg brace was optional or not required.

Dr. Pratt opined claimant had a 15% whole body impairment for gait derangement pursuant to Table 36 at Chapter 3, page 76 of the *Guides*. He also opined claimant had a Class II skin disorder and gave claimant a 10% whole body impairment for the skin graft utilizing Table 2 at Chapter 13, page 280. Dr. Pratt testified that pursuant to Chapter 13, page 281, a skin disorder is a whole body classification. He indicated that if claimant's 15% and 10% whole body impairments are combined, she has a 24% whole body impairment. A 15% whole body impairment for gait derangement converts to a 37% lower extremity impairment and a 10% whole body impairment for the skin graft converts to a 25% lower extremity impairment. Combining the 37% lower extremity impairment for the gait derangement with the 25% lower extremity impairment for the skin graft results in a 53% impairment to the left lower extremity.

Dr. Pratt also used an alternative method to calculate claimant's permanent functional impairment. He testified that he first assigned claimant a 47% permanent impairment to the left lower extremity for loss of muscle function and range of motion, which converts to a 19% whole body impairment. Dr. Pratt then gave claimant a 25% permanent impairment to the left lower extremity for the skin graft, which converts to a 10%

² Zimmerman Depo. at 6-8.

whole body impairment. He then combined the 19% and 10% whole body impairments for a 27% whole body impairment. Dr. Pratt testified that combining claimant's 25% impairment to the left lower extremity for the skin graft with the 47% impairment to the left lower extremity for loss of muscle function and range of motion results in a 60% permanent impairment to the left lower extremity. Dr. Pratt testified that using this method, he used the sections on muscle atrophy and range of motion, but not the section on gait derangement. His report states, "This appears to be a more appropriate way to assess her in terms of functional loss."³

On cross-examination, Dr. Pratt agreed a whole body impairment rating could be converted to a leg impairment rating by dividing it by .4 under section 3.2 at page 3/75 of the *Guides*. Dr. Pratt was not asked to assign claimant restrictions or to give an opinion concerning claimant's task loss.

Vocational expert Dick Santner was asked to evaluate claimant by her attorney. Mr. Santner obtained a work and educational history of claimant and reviewed Dr. Zimmerman's report. He identified 18 non-duplicative job tasks that claimant performed in the 15 years before her accident. With the restrictions given by Dr. Zimmerman, Mr. Santner identified the task of "answering the phone, taking messages, directing calls, that kind of thing"⁴ as claimant's only transferrable skill. He opined it would be questionable, given claimant's restrictions, age and physical condition that claimant could engage in substantial, gainful employment. When asked if claimant was permanently and totally disabled Mr. Santner replied, "I would lean very heavily in that direction, yes."⁵ Mr. Santner agreed that if claimant was merely limited to sedentary work, she had transferrable skills and was capable of working.

SALJ Lee determined claimant sustained a whole body impairment as a result of a gait derangement and skin graft. He adopted the opinions of Dr. Zimmerman and concluded claimant had a 50% whole body impairment for gait derangement and a 25% whole body impairment for the skin graft, for a combined whole body impairment of 63%.

Claimant was found by SALJ Lee to be permanently and totally disabled. In his Nunc Pro Tunc Award, the SALJ relied heavily on Mr. Santner's opinion that claimant was incapable of engaging in any type of substantial and gainful employment, given her restrictions, age and physical condition and the 100% task loss opinion of Dr. Zimmerman.

³ Pratt Depo., Ex. 2 at 5.

⁴ Santner Depo. at 7.

⁵ *Id.*, at 8.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The crucial issue in this claim is whether claimant suffered a scheduled injury to the left lower extremity or to the body as a whole. Claimant contends she sustained a whole body injury and a whole body impairment as she underwent a skin graft and has a gait derangement. She argues that the *Guides* provides residuals from a scar or skin graft and gait derangement are whole body impairments. Claimant cites K.S.A. 44-510e(a), which states functional impairment shall be established using the *Guides*.

Respondent argues that when the Kansas Legislature enacted K.S.A. 44-510d(b), it intended for scheduled injuries to be the general rule, not non-scheduled injuries, and cites *Casco*.⁶ In *Casco*, the Supreme Court of Kansas concluded that scheduled injuries are the general rule and non-scheduled injuries are the exception. Respondent asserts that K.S.A. 44-510d and *Casco* control, not the *Guides*. Finally, respondent asserts claimant's skin graft and gait derangement are limited to claimant's left lower extremity and claimant's whole body impairment can be converted to the level of the left lower extremity.

K.S.A. 44-510d in part provides:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66⅔% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation

⁶ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

(b) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, except that the director, in proper cases, may allow additional compensation during the actual healing period, following amputation. The healing period shall not be more than 10% of the total period allowed for the scheduled injury in question nor in any event for longer than 15 weeks. The return of the employee to the employee's usual occupation shall terminate the healing period.

K.S.A. 44-510e(a) states in part:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Here, the competent medical evidence is that claimant's functional impairment is limited to her left lower extremity. Drs. Zimmerman and Pratt agree that the situs of claimant's impairment is her left leg. The effects of her skin graft are limited to her left leg. The skin was harvested from claimant's left thigh and grafted to her left ankle. No other body parts were affected by the skin graft. Similarly, claimant's gait disorder is limited to the left lower extremity. Claimant did indicate she sometimes had lower back and hip pain, but never received treatment or an impairment rating. The only justification for finding claimant has a whole body impairment is that the *Guides* provides a skin disorder and a gait derangement are whole body impairments. However, Dr. Pratt, using the methodology contained within the *Guides*, converted claimant's whole body impairments for the skin disorder and gait derangement to lower extremity impairments, which combined for a 60% permanent functional impairment to the left lower extremity.

Pursuant to *Casco*, scheduled injuries are the general rule and non-scheduled injuries are the exception. The *Guides* does not control whether an injury is a scheduled or non-scheduled injury; rather, it is the Kansas Workers Compensation Act that controls.

Accordingly, the Board finds claimant's injuries were limited to her left lower extremity and claimant did not suffer a general body injury. The Board also finds claimant's functional impairment is limited to the left lower extremity.

At oral argument before the Board, claimant's attorney argued that if the Board finds claimant has only a left lower extremity injury, claimant is still entitled to a work disability. Claimant contends a strict reading of K.S.A. 44-510e supports this argument. The Board rejects this argument. K.S.A. 44-510e(a) in part states, "Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is **not** covered by the schedule in K.S.A. 44-510d and amendments thereto." (Emphasis added.) K.S.A. 44-510e(a) goes on to provide that only where an injured worker has a permanent partial general disability is he or she entitled to a work disability.

CONCLUSION

1. Claimant sustained a scheduled injury to her left lower extremity, not a non-scheduled injury. Claimant has a 60% permanent functional impairment to the left lower extremity.
2. Claimant is not eligible for a work disability or a permanent total disability.
3. All other issues are moot.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁷ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the March 1, 2012, Award and March 8, 2012, Nunc Pro Tunc Award entered by SALJ Lee by finding that claimant has a scheduled injury and permanent functional impairment to the left lower extremity.

Monica Hernandez is granted compensation from The Hamm Companies and its insurance carrier for an April 24, 2008, accident and resulting disability. Based upon an average weekly wage of \$325.38, Ms. Hernandez is entitled to receive 90 weeks of temporary total disability benefits at \$216.93 per week, or \$19,523.70, plus 66 weeks of permanent partial disability benefits at \$216.93 per week, or \$14,317.38, for a 60%

⁷ K.S.A. 2011 Supp. 44-555c(k).

permanent partial disability, making a total award of \$33,841.08, which is all due and owing less any amounts previously paid.

All past reasonable and related medical expenses incurred by claimant are to be paid by respondent and its insurance carrier.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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